

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

vs.

CAPISTRANO UNIFIED SCHOOL  
DISTRICT,

Respondents.

OAH No. 2005110669

**ORDER REGARDING MOTION FOR  
STAY PUT**

On November 23, 2005, the Office of Administrative Hearings (OAH) received a motion for stay put from attorney Timothy Adams, on behalf of Petitioner Student. In the motion, Petitioner explains that the last agreed upon individualized education program (IEP), dated January 28, 2005, is from Student's prior district of residence, Orange Unified School District (Orange). Petitioner states that the January 28, 2005 IEP included applied behavioral analysis (ABA) provided by Coyne & Associates, a non-public agency (NPA). Petitioner alleges that Student enrolled in Respondent Capistrano Unified School District (Respondent) on October 3, 2005, but that Capistrano refused to implement the January 28, 2005 IEP from Orange. Petitioner seeks a stay put order requiring Capistrano to maintain Student in Student's current educational placement pursuant to the January 28, 2005 IEP, including providing services "through the agencies specifically described" in that IEP.

On December 7, 2005, OAH received an opposition to the stay put motion from attorneys Daniel Harbottle and Lyndsy B. Rutherford, on behalf of Respondent. Respondent argues that it has offered to implement Petitioner's January 28, 2005 IEP in its entirety, with no changes except that Respondent would utilize Respondent's employees to provide all services previously provided through Coyne & Associates. Respondent argues that it has a legal obligation to offer services comparable to those in Petitioner's January 28, 2005 IEP, but is not obligated to employ the same vendors that Orange used to provide those services.

## APPLICABLE LAW

Under federal and State special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); Cal. Educ. Code §§ 56505(d), 48915.5.) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent Sch. Dist.*, 695 F.2d 949, 953 (5th Cir. 1983); *Zvi D. v. Gordon Ambach*, 694 F.2d 904 (2d Cir. 1982).) For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) In *Honig v. Doe* (1988) 484 U.S. 305, the United States Supreme Court affirmed that the right to stay put is "unequivocal."

20 U.S.C. section 1414, subdivision (d)(2)(C)(i)(1), which became effective on July 1, 2005, provides for an interim placement for special education students who transfer to a new school district within the same state. That section provides as follows:

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

The Proposed Regulations following the Individuals with Disabilities Education Improvement Act (IDEIA) of 2004 contain a Proposed Regulation, 34 C.F.R. section 300.323(e), which mirrors 20 U.S.C. section 1414(d)(2)(C)(i)(1). The comments to Proposed Regulation 34 C.F.R. section 300.323(e) indicate that the provision "would implement the Act and the Department's longstanding policy regarding students who transfer public agencies within the same State." (Federal Register, Vol. 70, No. 118, p. 35805.)

California Education Code section 56325(a)(1), which went into effect on October 7, 2005, similarly addresses the situation in which a child transfers from one school district to another school district which is part of a different SELPA. Section 56325(a)(1) mirrors the section 1414(d)(2)(C)(i)(1), with the additional provision that, for a student who transfers into a district not operating under the same special education local plan area (SELPA), the LEA shall provide the interim program "in consultation with the parents, *for a period not to exceed 30 days*, by which time the local educational agency shall adopt the previously approved [IEP] or shall develop, adopt, and implement a new [IEP] that is consistent with federal and state law." [Emphasis added.]

While section 1414(d)(2)(C)(i)(1) and section 56325(a)(1) describe the obligations of school districts into which special education students transfer, they do not explicitly address the new district's obligation to provide stay put when a parent files a due process complaint challenging the services offered by the new school district. That issue is addressed in *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, at pages 1133-1134 (9th Cir.2003):

We have held that to keep a student in the 'then current educational placement,' a district typically has the obligation to provide the 'placement described in the child's most recently implemented IEP.' [citing *Johnson ex rel. Johnson v. Special Educ. Hearing Off.*, 287 F.3d 1176, age page 1180 (9th Cir. 2002)] This obligation, however, is not absolute. We have held that when a student falls under the responsibility of a different educational agency- - for example, when a student becomes old enough to receive services from a school district rather than a preschool school provider- - the new agency need not provide a placement identical to that provided by the old agency. *Johnson*, 287 F.3d at 1182-1183. Although the 'stay put' provision is meant to preserve the status quo, we recognize that when a student transfers educational jurisdictions, the status quo no longer exists. *Id.*

The OSEP has stated that when a student transfers to a new district, and there is disagreement on appropriate placement, the new district must implement the last agreed-upon IEP 'to the extent possible.' [citing OSEP letter] 'To the extent implementation of the old IEP is impossible, the new district must provide services that approximate, as closely as possible, the old IEP.' *Id.* We defer to and adopt the position of the OSEP in the [letter] because the OSEP is the agency responsible for monitoring and administering the IDEA and because the [letter] comports with the purposes of the IDEA. [citation omitted] We hold that when a dispute arises under the IDEA involving a transfer student, and there is disagreement between the parent and the student's new school district about the most appropriate educational placement, the new district will satisfy the IDEA if it implements the student's last agreed-upon IEP; but if it is not possible for the new district to implement in full the student's last agreed-upon IEP, the new district must adopt a plan that approximates the student's old IEP as closely as possible. The plan thus adopted will serve the student until the dispute between the parent and school district is resolved by agreement or by administrative hearing with due process.

## **DISCUSSION**

The parties agree that the January 28, 2005 IEP from Orange is the last agreed-upon and implemented IEP, and further agree that Respondent is obligated to provide Petitioner with the services in that IEP pursuant to the requirements of stay put.

Respondent points to the “comparable services” language contained in 20 U.S.C. section 1414(d)(2)(C)(i)(1). However, that section, along with California Education Code section 56325(a)(1), addresses only short-term interim placement, and does not explicitly address the new district’s obligation to provide stay put when a parent challenges the services offered by the new school district. Rather, the standard for stay put in the present circumstances is addressed in *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d at 1133-1134, which holds that, when a dispute arises, the new district’s stay put obligation is to implement the last agreed-upon IEP or adopt a plan that approximates the student’s old IEP as closely as possible. Given that the U.S. Supreme Court established in *Honig v. Doe* that the right to stay put is unequivocal, and there is no indication that Congress intended section 1414(d)(2)(C)(i)(1) to alter this unequivocal right, the standard for stay put identified in case law such as *Ms. S. v. Vashon Island Sch. Dist.* remains applicable. Moreover, given that section 1414(d)(2)(C)(i)(1) offers no guidance regarding what constitutes “comparable services,” other than the comment in the Proposed Regulation that the rule implements the IDEIA and the U.S. Department of Education’s longstanding policy, it is logical to interpret those sections in light of the applicable case law.

Respondent does not suggest that it would be impossible within existing resources to continue Petitioner’s services from Coyne & Associates. Thus, Respondent is obligated to implement Petitioner’s January 28, 2005 IEP to the extent possible, including utilization of Coyne & Associates as a service provider pursuant to that IEP.

## **ORDER**

Petitioner’s motion for stay put to include provision of services by the agencies identified in the January 28, 2005 IEP is granted.

Dated: December 15, 2005

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SUZANNE B. BROWN  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings